

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2006-0444, A&B Lumber Company, LLC v. Henry Hoppe & a., the court on October 11, 2007, issued the following order:

The defendants, Henry and Josephine Hoppe, appeal the denial of their request for a directed verdict and the award of attorney's fees and costs to the plaintiff, A&B Lumber, LLC. They argue that: (1) the plaintiff failed to prove all the elements of estoppel; (2) the plaintiff failed to prove unjust enrichment; (3) the trial court's instruction on estoppel was erroneous; and (4) the trial court erred in awarding attorney's fees to the plaintiff. We affirm.

A party is entitled to a directed verdict only when the sole reasonable inference that may be drawn from the evidence, which must be viewed in the light most favorable to the nonmoving party, is so overwhelmingly in favor of the moving party that no contrary verdict could stand. DeBenedetto v. CLD Consulting Eng'rs, 153 N.H. 793, 812 (2006). Our review of the issue is extremely narrow; absent an unsustainable exercise of discretion, we will not overturn the trial court's decision. *Id.* We will uphold the denial of the motion where sufficient evidence in the record supports the ruling. *Id.*

The essential elements of estoppel are: (1) a representation or concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom the representation was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; and (5) the other party must have been induced to act upon it to his prejudice. Town of Nottingham v. Lee Homes, Inc., 118 N.H. 438, 442 (1978).

The defendants argue that there was no representation made with the intention of inducing the plaintiff to rely upon it. We have previously held that an estoppel may arise from silence or inaction as well as from words or actions. See Concrete Constructors, Inc. v. Harry Shapiro & Sons, Inc., 121 N.H. 888, 892-93 (1981). Because there was evidence in the record from which the jury could find in favor of the plaintiff, we find no error in the trial court's denial of the defendants' request for a directed verdict on the issue of estoppel.

The defendants also contend that the plaintiff failed to present sufficient evidence to prevail on its claim of unjust enrichment. A trial court may require a

party to make restitution for unjust enrichment if he has received a benefit that would be unconscionable for him to retain. Kowalski v. Cedars of Portsmouth Condo. Assoc., 146 N.H. 130, 133 (2001). To recover under a claim of restitution, the party must show that there was unjust enrichment either through wrongful acts or passive acceptance of a benefit that would be unconscionable to retain. *Id.*

The trial court's May 16, 2006 order indicates that the jury returned a verdict for the plaintiff on a general jury verdict form. The evidence presented at trial established that: (1) the plaintiff provided lumber for the construction of the defendants' home; (2) the plaintiff never received payment for the lumber; (3) there were sufficient funds in the construction loan account to pay the plaintiff when the lack of payment was made known; (4) defendant Henry Hoppe told the plaintiff to contact Hoppe's bank for payment when the plaintiff contacted him; (5) Hoppe advised the bank not to pay the plaintiff unless the plaintiff sued; and (6) when completed, the defendants' house was valued well in excess of the amount of money spent to construct it. Based upon our review of the record, we conclude that the evidence supports a finding of unjust enrichment.

The defendants also argue that the trial court erred in awarding attorney's fees to the plaintiff. We review a trial court's award of attorney's fees under an unsustainable exercise of discretion standard, giving deference to the trial court's decision. LaMontagne Builders v. Brooks, 154 N.H. 252, 259 (2006). We will affirm the award unless the discretion is exercised for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party; if there is some support in the record, we will uphold the award. *Id.*

In light of our rulings above, we need not address the alleged error in the trial court's instruction.

The trial court awarded attorney's fees to the plaintiff after finding that the defendants' behavior had been patently unreasonable. In support of its finding, the trial court cited the defendants' knowledge that their contractor's sub-contractors were not being paid, the Hoppes' continued execution of construction lien waiver affidavits despite this knowledge and their instructions to the bank not to pay the plaintiff unless it sued. Given all of the evidence presented, we find no error in the award.

The plaintiff has requested an award of attorney's fees for this appeal. Supreme Court Rule 23 provides that we may award attorneys' fees if we deem an appeal to have been frivolous or made in bad faith. We have reviewed the record before us and conclude that such an award is merited in this case. Accordingly, the plaintiff shall file with this court a statement of fees incurred in this appeal within fifteen days of the date of this order. To the extent that

the defendants may contest the reasonableness of the requested fees, they may file an objection within ten days following plaintiff's submission.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**